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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 110.

CHASE SECURITIES CORPORATION, Now Known as Amerex Holding Corporation,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON and FRANK A. DONALDSON, JR., Executors of The Estate of Ruth Chase Donaldson, Deceased, Substituted as Respondents,

Appellees.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1944.

CHASE SECURITIES CORPORATION, NOW KNOWN AS AMEREX HOLDING CORPORATION,

Appellant,

vs.

(RUTH CHASE DONALDSON), FRANK A. DONALDSON AND FRANK A. DONALDSON, JR., EXECUTORS OF THE ESTATE OF RUTH CHASE DONALDSON, DECEASED, SUBSTITUTED AS RESPONDENTS,

Appellees.

No. 110.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

Constitutional Issues Seasonably Raised.

Appellees urge that the case is not reviewable because no federal questions were seasonably raised. Such contentions are supported by no substantial argument or authority not considered by this Court on the jurisdictional briefs of the parties, upon which this Court entered its order noting probable jurisdiction. Since, however, their consideration requires review of procedural history, also involved on the merits, we shall postpone our argument on jurisdiction until after discussion of the merits. (*Infra*, pp. 30-36.)

APPELLANT'S POINT I.

Denial of Due Process by Statutory Abrogation of Final Judgment.

(Appellant's Brief, pp. 13-20; Appellees' Brief, pp. 33-52.)

Upon analysis, appellees' extended and somewhat labored answer to appellant's Point I reduces itself to this:

> (1) there was no separate "cause of action upon a liability created by statute" which could be the subject of a "final judgment"; and
>
> (2) there was no final judgment, such as would be entitled to the protection of the due process clause.

These assertions are presented with more emphasis on labels and terminology than on substance and the record facts.

Separate Right of Action on Statutory Liability.

We submit that all of the determinations of the trial court and of the State Supreme Court, as well as the basic theory of all proceedings taken therein by both parties, establish beyond reasonable argument that the claim based on breach of statute was separate and distinct from that based on fraud. All courts declared and held, in legal effect, that such claim constituted a separate cause of action. Even as late as the second appeal in the State Supreme Court appellees themselves affirmatively so argued.[1]

---

[1] Appellees, summarizing their conclusions in their Re-Brief, said (p. 46):

> "(1) Her statutory or Blue Sky *cause of action* based on non-registration of stock and non-licensing of agent.

Their recent change in terminology from "cause of action" to "issue" or "ground" should therefore be examined critically. Obviously it is the result of their difficulty in finding an argumentative escape from the determinative effect of the decision on the first appeal.

However, that phase of the case which involved statutory violation alone, whether called "issue", "ground" or "claim", none the less involved a cause of action entirely distinct from that based on fraud.

No amount of terminological refinement can obscure the legal effect of the following essential record facts:

The complaint, without separation—either numerical or formal—into counts, alleged:

(1) Breach of fiduciary relations between Broker and Customer;[2]

(2) Blue Sky Law violation;

(3) Fraud based on misrepresentation;

(4) Implied fraud resulting from sale alone;

(5) Fraud by concealment of the above.

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though barred under decision on former appeal, has been constitutionally revived by Laws 1941, c. 547, §18.

"(2) Her *cause of action* based on actual fraud, perpetrated through implied representations as to (a) registration, (b) licensing of agent, and (c) free and uncontrolled market, was established by competent evidence. *This cause of action* had not [been] outlawed in 1941 and was recognized by the 1941 statute." (Italics supplied.)

[2] Since the Broker-Customer relationship was inconsistent with a Seller-Buyer relationship, the appellees, forced by appellant's pretrial motion, elected to stand on the latter (R. 33-34). This is the so-called "stipulation" relied upon by appellees to demonstrate that there was only one cause of action. (Appellees' Brief, p. 13). Appellant did not challenge the joinder of the consistent causes of action for violation of statute and for fraud which joinder Minnesota Code provisions permitted. Appellees' counsel and the trial court, even at that time, noted the presence of the statutory and fraud liabilities (R. 26-27, ff. 85-86; R. 34, f. 96). See *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, 238 N. W. 12, 239 N. W. 672.

Out of this declarational hodge-podge, the trial judge spelled a cause of action for violation of the Blue Sky Law, made findings appropriate to that issue alone, and held thereon for appellees[3] (R. 258-9). Judgment was entered (R. 274). There were no findings on the fraud issues (R. 258, par. 26; 266-8). On the contrary the trial judge expressly refused to make such findings and denied appellees' motion to that end[4] (R. 273-4), having previously expressly stated in his memorandum (R. 267) that his decision was based only on the "independent ground" of statutory liability, to which appellees' counsel had *agreed*. Appellees did not appeal.

May appellees now reasonably contend that such judgment was not supported by an adequate cause of action, and that the same did not rest *solely* upon a determination of the "issue" or "matter" or "independent ground" of violation of the Blue Sky Law?

The trial judge did not, as appellees claim (Brief, p. 15), reserve fraud issues for future determination. The findings, conclusions and order for judgment were complete and final and judgment was entered without reservations. Barring appeal, the case was ended.

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[3] It is settled Minnesota law that whether a complaint states more than one cause of action is a question of law, to be determined not by the form of the pleading or by the numbering or labelling of its paragraphs, but by the facts alleged. *Dewing* v. *Dewing* (1910), 112 Minn. 316, 127 N. W. 1051; and *Bacich* v. *Northland Transportation Co.* (1928), 173 Minn. 538, 217 N. W. 930.

[4] The court said (R. 274):

> "The court having heard the arguments of counsel and being of the opinion that the present findings are adequate to support the order for judgment, for the reason that the court has sustained recovery for the plaintiff on an independent ground, namely, violation of the Blue Sky Law, and tolling of the statute of limitations, and that therefore it is unnecessary at this time to make findings on the issues presented in said notice of motion."

The appeal from such judgment was upon all the issues and findings supporting it: whether there was a violation of the statute, and, if so, whether the action therefor was barred by expiration of the six-year limitations, which in turn depended upon the tolling question. It was as complete an appeal on the merits of that statutory claim as if it had been alleged in, and tried as, a separate case. Upholding the bar, the Supreme Court said in the companion *Pomeroy* case (upon which its short opinion in this case was expressly hinged) [R. 362]:

> "It is enough of the facts that plaintiff must be considered to have sued 'upon a liability created by statute' arising from defendant's business in Minnesota. Under Mason Minn. St. 1927, §9191, the action is barred, not having been commenced within six years from the time the cause of action accrued, * * *, unless saved by the tolling provisions * * *" (R. 354).

It is thus beyond fair argument that the Court decided that plaintiff had sued upon a "cause of action" based upon a liability created by statute and that the action was barred, since limitations were not tolled.[5]

Appellees recognized the distinction between the issues of Blue Sky liability and fraud in their motions, upon remand after such appeal, for findings as to "issues of fraud" (R. 277-84), and, after the passage of the 1941 statute, for an additional finding that "Plaintiff's cause of action, based upon illegal sale" of the security was "revived by that law (R. 285-286).

[5] Appellees' repeated insistence (Appellees' Brief, pp. 15, 36, 37) that the State Court decided only that limitations were tolled, and not that the cause of action was barred, is unworthy of serious consideration. As noted above, the Court said specifically that "the action is barred * * * unless saved by the tolling provisions * * *" and held that it was not saved. Otherwise, the tolling question would have been moot.

The same distinction was preserved throughout to the very opinion on the decision from which this appeal is taken. The trial court, in its new findings after remand, distinguished between that portion of the action relating to fraud (governed by limitations expressly covering fraud actions) and that portion relating to breach of statute and implied fraud (governed by the 1941 statute). (Finding XXXII, R. 313-314). The State Supreme Court's opinion on the second appeal followed the same distinction and expressly declined to consider or determine "that phase of the case" relating to "deceit".[6]

Such division by both parties and all courts was logical. Each claim involved different facts and law. Statutory liability required proof only of non-registration, which *per se*, supported recovery.[7] But liability for fraud required proof of scienter, material misrepresentations of fact, and purchaser's reliance thereon to her injury, which were entirely separate from the statutory claim, as appellees' motion for findings on fraud after remand recognized (R. 277-284)

Consequently, appellees' cases, holding that where separately stated claims rest on identical facts they constitute but one cause of action,[8] imply that where, as here, the facts

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[6] So also did the Circuit Court of Appeals in the case of *Chase Securities Corporation* v. *Vogel* (110 Fed. (2d) 607), which case involved substantially the same type of hodge-podge complaint (See Appellant's Main Brief, pp. 15-16).

[7] *Schaar* v. *Comforth* (1915), 128 Minn. 460, 151 N. W. 275 (statute regulating speed of motor vehicle; see also other statutory violation cases listed in opinion); *Dohm* v. *R. N. Cardozo & Bro.* (1925), 165 Minn. 193, 206 N. W. 377, 378; *Karpeles* v. *Heine* (1919), 227 N. Y. 74 at 79, 124 N. E. 101 at 102; *Olsen* v. *Retzlaff* (1931), 184 Minn. 624 at 628, 238 N. W. 12 at 14; Appellant's Main Brief, pp. 14-15.

[8] See, *e. g.*, *Tuder* v. *Oregon Short Line Ry. Co.* (1915), 131 Minn. 317, 155 N. W. 209; *Seaboard Air Line Ry. Co.* v. *Koennecke* (1915), 239 U. S. 352, 60 L. Ed. 324; *Hurn* v. *Oursler* (1933), 289 U. S. 238, 77 L. Ed. 1148 (Appellees' Brief, p. 52).

required to be proved are not identical, then different causes of action may be, and certainly separate judiciable rights are, involved.

On the first appeal where the application of the proper limitations statute necessarily required a decision on the true nature of the action, the State Supreme Court stated, not "casually" (as suggested by appellees, p. 47) but determinatively, that it was one founded "upon a liability created by statute". The description given the same case on the second appeal, as one in "tort"[9] for violation of a statutory duty of registration, is entirely consistent. Neither the opinion itself nor any authorities cited by appellees support their contention to the contrary.

The decisive test is that a statutory duty, breach of which creates liability *per se*,[10] is one which could not exist but for the statute. It has no basis in common law (Main Brief, pp. 14-15). The distinction between tort actions predicated upon breach of statute and those predicated upon fraud is emphasized in *Olesen* v. *Retzlaff* (1931), 184 Minn. 624, at p. 628, 238 N. W. 12 (involving a bank directors' liability statute). That Court said (p. 14):

> "• • • A violation of the statute gives the right of action. Nothing more is necessary if damage accrues. • • • Simple disobedience to the statute brings liability without the existence of other wrongdoing. • • •
>
> "There is no such action as this at common law. • • • We hold that an action which is based alone on

[9] It is elementary that the word "tort", as applied to a form of action, merely describes an action for breach of a duty, which may have been created by statute or common law. *Bouvier's Law Dictionary, "Tort"; Restatement of Torts*, Vol. 2, Sec. 285-286. The term distinguishes the action from one on contract, as *Drees* v. *Minn. Petroleum Co.* (1933), 189 Minn. 608, 250 N. W. 563, relied upon by appellees (pp. 46-50) so states.

[10] See footnote 7, *supra*, p. 6.

section 10407 [bank directors liability statute] is not an action to recover on the ground of fraud within section 9191(6) [limitations governing fraud actions]."

. . . . . .

"That there may be actual and actionable fraud justifying a recovery, apart from the statute, and within the meaning of section 9191(6), is without much doubt."

And on reargument (184 Minn. 624 at p. 628, 239 N. W. 672):

"A cause of action has come about by the construction of courts because of the violation of a criminal statute. There was no such action at common law; that is, there was no such liability."

This case was followed in *Burzinski* v. *Kinyon Investment Co.* (1934), 192 Minn. 335, 256 N. W. 233 (involving the Blue Sky Law).

Taken in the light of the various phases of this case as they finally developed and were determined, appellees' very insistence that they relied upon four separate "grounds" of recovery, one of which was statutory-breach (Appellees' Brief, pp. 6, 60), itself sustains the independence of the statutory claim from that which remained of the appellees' case, however originally pleaded, after remand on the first appeal.

Whatever terminology is employed, the fundamental reality is that the State Court of last resort specifically and finally determined the one phase of the case submitted to it—namely, that the plaintiff's right of action for breach of the Blue Sky Law was barred. No appeal was taken by the appellees from that decision nor has it ever been over-

ruled by the Court itself. In every sense it was a final adjudication upon that single, separate cause.

The Finality of the Decision on the First Appeal.

Nor can there be doubt as to the finality of the decision on the first appeal. The cause of action (or "claim" or "ground" or "issue") resting on statutory violation was "merged and gone forever,"[11] and thereafter the plaintiff could pursue her suit only in so far as based on other (fraud) issues. To assert that the case was still "pending" on this cause is, under the circumstances, futile. Certainly a case was pending, but only for the determination of the separate cause of action for fraud. Just as certainly it was not pending with respect to any right of action or claim for Blue Sky violation alone. In the latter respect, the determination was final.

Such separate basis of action and the finality of its prior adjudication were recognized in the language of the State Supreme Court on the second appeal,

> "On the trial below the court found in favor of plaintiff on the basis of a violation of the statute. * * * On appeal, this court held that the general six-year statute had run against plaintiff because, notwithstanding the withdrawal of defendant from the state, service of summons could at all times have been made * * *" (R. 403)

and in the language used in its conclusion: "We think it (the proviso) does (apply) even though it was passed subsequent to a determination by this court that the cause was barred"[12] (R. 408-409).

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[11] *United States* v. *Leffler* (1837), 11 Pet. 86, at 100-1, 9 L. Ed. 642, at 647.

[12] The last statement was made in answer to the Court's question "Does the proviso apply to cases already pending?". The use of the

Although appellees insist that every word in the Court's opinion which they consider favorable must be deemed conclusive they do not hesitate to characterize the above quoted words as "inadvertent" (Brief, p. 38). Indisputably, the words were accurate.

This Court also necessarily assumed finality in the determination on the first appeal when, in *Chase Securities Corporation* v. *Vogel* (1941), 312 U. S. 666, 85 L. Ed. 1110, it reversed a judgment of the Circuit Court of Appeals for the Eighth Circuit against appellant on the merits of an identical claim for liability for non-registration of the same security, and remanded that case "for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the *Pomeroy* and *Donaldson* cases" (on the first appeal).[13]

Even appellees considered the decision final as to the determined question. They promptly moved for amended findings on the fraud claims only (R. 277-284). It was not

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plural "cases" was not inadvertent. The Court was obviously referring to the many cases, similar to the case at bar, awaiting trial after determination of this test case. (The State Supreme Court and this Court may take judicial notice of such cases, officially recorded in the State District Court Clerk's office). Under a strictly literal interpretation of the 1941 statute, the proviso could apply only to actions "brought within a period of one year following such effective date" (July 1, 1941). The Court, having already concluded that the 1941 statute could and did lift the bar of limitations or revive a cause of action, wished to show that cases (like the one at bar) brought *prior* to July 1, 1941 were affected. Applying, however, the proviso to this case, it by-passed the question of prior determination on the first appeal by erroneously relying on *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281, 144 N. E. 579, 582, where a special situation, not here applicable, was presented (Appellant's Main Brief, pp. 31-2), and in effect considered this case "pending" in the same sense as other non-litigated cases against appellant were "pending".

[13] It is significant that, as pointed out in our Main Brief (p. 15), the complaint in the *Vogel* case intermingled allegations of breach of statute with fraud in substantially the same manner as in the case at bar.

until after the enactment of the 1941 statute that they first claimed that their statutory "cause of action" was "revived" by such law (R. 285-286).[14]

Appellees' assertion that the statutory liability phase of the case was "pending" after the judgment on the second appeal, shows the same confused thinking as was evident in the State Supreme Court's opinion which, like appellees, relied upon *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238 N. Y. 271, 144 N. E. 579. There, the Appellate Division had affirmed the lower court order granting defendant's motion to dismiss the complaint on the ground that the action was barred by then applicable limitations. While plaintiff's appeal from that order was pending in the Court of Appeals, the legislature enacted a law which the latter court held applicable to the action because it was pending on appeal on that very issue. The New York Court relied upon some of the same cases which appellees here cite (Appellees' Brief, pp. 39-40), all of which permit application of a subsequent statute to those questions or issues still pending on appeal and as to which the highest state court has not yet made a final determination.[15] Such

[14] The purported revival admittedly being one effected *only* by reason of subsequent legislation and not by a mere overruling or reversal of a prior rule of law, appellees' cases saying that *judicial* reconsideration and reversal does not deprive a litigant of property within the due process clause are not in point. See, e.g., *Tidal Oil Co.* v. *Flanagan* (1924), 263 U. S. 444, 68 L. Ed. 382, and *Central Land Co.* v. *Laidley* (1895), 159 U. S. 103, 40 L. Ed. 91, and other similar cases cited at pages 31-32 of Appellees' Brief.

[15] Representative of these are *Dinsmore* v. *Southern Express Co.* (1901), 183 U. S. 115, 46 L. Ed. 111; *Union Pacific R. R. Co.* v. *Snow* (1913), 231 U. S. 204, 58 L. Ed. 184 and *Gulf C. & S. F. Ry. Co.* v. *Dennis* (1911), 224 U. S. 503, 56 L. Ed. 860. All of them are based upon *United States* v. *Schooner Peggy* (1801), 1 Cranch 103, 2 L. Ed. 49, which, as appellees point out, says "if subsequent to the judgment *and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed * * *." (Italics supplied.)

pendency of the action is so strongly emphasized in these cases that it can be inferred that they, in effect, say that if the action is no longer pending on the question to which the new statute would be applicable, then the subsequent law cannot constitutionally be applied to it.

The other cases cited (Appellees' Brief, pp. 36-38) for their contention of non-finality are distinguishable and constitute, by like inference, authority in support of finality.[16]

Appellees' claim that there could be no final judgment until it was entered by the trial court after remand, is without merit (Appellees' Brief, pp. 35-36). The Supreme Court did enter a judgment of reversal and for costs (R. 363). Moreover, the trial court's formal act in entering its judgment is not necessary to the protection of the Supreme Court's determination as final. As said in *Jordan* v. *Humphrey* (1884), 32 Minn. 522, 21 N. W. 713, the Supreme Court's opinion may be considered to establish that reversal alone constitutes a final adjudication. So, also, this Court

[16] Some of them considered only a determination and remand on questions of pleading or procedure. *Great Western Telegraph Co.* v. *Burnham* (1895), 162 U. S. 339, 40 L. Ed. 991 (the parties should have the opportunity "to make a new case by amendment"), *Haseltine* v. *Central Bank* (1901), 183 U. S. 130, 46 L. Ed. 117 ("the defeated party may amend his pleading . . . and go to trial upon new evidence"), *Aurora City* v. *West* (1868), 7 Wall. (U. S.) 82, 19 L. Ed. 42 (a procedural question), and *Hickey* v. *Johnson* (C. C. A. 8th Cir.—1925), 9 Fed. (2d) 498 (a pleading question). Others, like *Moss* v. *Ramey* (1915), 239 U. S. 538, 60 L. Ed. 425, *King* v. *West Virginia* (1909), 216 U. S. 92, 54 L. Ed. 396, and *Messenger* v. *Anderson* (1911), 225 U. S. 436, 56 L. Ed. 1152 involved a reversal or reconsideration of prior rulings in the case while it remained pending in court on all issues. The Minnesota cases which say that a remand "upon all issues in the case", like *Standard Lithographing Co.* v. *Twin City Motor Speedway Co.* (1920), 145 Minn. 5, 176 N. W. 347, or that a prior decision in a *pending* action may be overruled, like *Kozisek* v. *Brigham* (1931), 183 Minn. 457, 237 N. W. 25, are not applicable. The decision here on the first appeal has not been overruled by any court.

in *Gulf Refining Co.* v. *United States* (1925), 269 U. S. 125, 70 L. Ed. 195, held that the judgment of reversal and remand of a case were final where:

> "There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration."

To the same effect are *Mower* v. *Fletcher* (1884), 114 U. S. 127, 29 L. Ed. 117, and *Cole* v. *Violette* (1943), 319 U. S. 581, 87 L. Ed. 1599. Upon no theory can it be said that the adjudication was merely "an interlocutory ruling", as appellees assert without reference to authority (Appellees' Brief, pp. 16, 33, 34, 81). See *Lodge* v. *Twell* (1889), 135 U. S. 232, 34 L. Ed. 153, and 1 Freeman, *Judgments*, Sec. 38, p. 63.

The judgment of reversal on the issue that the action for Blue Sky violation was barred left no possible ground for relitigation of that issue in the trial court. By any test, it was an adjudication on the merits that there could be no recovery on the statutory claim. No new evidence as to that issue was available. A new trial on it would have been useless.

The freedom from statutory liability accorded appellant by the decision was a property right entitled to constitutional protection. *Terre Haute &c. Rd. Co.* v. *Indiana* (1904), 194 U. S. 579 at page 589.

If the decision had been in appellees' favor it is inconceivable that it could be claimed that there was not a final determination vesting in appellees' constitutionally protected rights.

The Finality of the Determination Assures Constitutional Protection.

If, as we believe, the determination on the first appeal was final in barring the statutory claim, it follows that such issue was not pending when the 1941 statute was passed.

If, as we also believe, the premise of finality is sound, it follows that appellant had a vested property right in such determination, which could not be abrogated by the 1941 statute in violation of the due process clause. We have found no case where this Court has departed from the well-established rule that a final "judicial judgment"[17] vests rights in favor of the successful party, which are constitutionally protected from later legislative action. *McCullough* v. *Virginia* (1898) 172 U. S. 102, 43 L. Ed. 382; *Hodges* v. *Snyder* (1923), 261 U. S. 600, 67 L. Ed. 819. See other cases, Main Brief, page 18. Appellees do not question the principle of these cases or their applicability, if, as a matter of law, the decision on the first appeal was final and determinative of the statutory claim.

Appellees' asserted distinction of *Pope* v. *United States* (1944), ... U. S. ....., 89 L. Ed. 5 (see our Main Brief, pp. 19-20; Appellees' Brief, p. 41), that there "an unreversed judgment conclusively established that a claimant was not entitled to recover", emphasizes its applicability to the case at bar.[18] The judgment was as final and involved

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[17] As distinct from "administrative orders". *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370 at p. 381; footnote 25, 84 L. Ed. 814.

[18] None of the other cases cited in this subsection of their brief (pp. 41-2) considered and decided the constitutionality of a statute, under the federal due process clause, as applied to relitigation of an issue. *Guilford* v. *Western Union Tel. Co.* (1894), 59 Minn. 332, 61 N. W. 324; *State of Wisconsin* v. *Torinus* (1881) 28 Minn. 175, 9 N. W. 725; *West Side Ry. Co.* v. *Pittsburgh Const. Co.* (1911) 219 U. S. 92, 55 L. Ed. 107. They afford no precedent helpful to appellees' contention.

as much a right of property in favor of the defendant here as in that action.[19]

The State Supreme Court's decision on the second appeal, that the 1941 statute applied even in the face of a prior "determination" by that court "that the cause was barred", was contrary to this principle, again recently observed, in *Demorest* v. *City Bank Farmers Trust Co.* (1944), 321 U. S. 36 at 48, 88 L. Ed. 340, at 347, which sustained the constitutionality of a statute because:

> "This statute does not purport to open accountings already closed or to take away rights or remainders judicially settled under the old rule. The statute is applied only to judicial settlements pending at or instituted after its enactment."

APPELLANT'S POINT II.

The Statutory Right of Action Expired by Limitations Prior to the 1941 Statute—Campbell v. Holt Considered.

(Appellant's Brief, pp. 20-35; Appellees' Brief, pp. 56-74.)

Appellees' summary of appellant's contentions on Point II is so confusing that we restate them briefly: (1) The State Supreme Court on both appeals held the Blue Sky phase of the action to have been one founded upon a liability created by statute. The then existing limitation statute conditioned the appellees' right to recover and extinguished it by passage of time (Appellant's Brief, pp. 21-24). (2) The Court erred in applying *Campbell* v. *Holt*, which involved only a common law action on contract

[19] It must not be overlooked that the State Supreme Court actually entered a judgment of reversal as well as for costs (R. 363) in spite of appellees' statement that this was merely a judgment for costs. (Appellees' Brief, p. 33.)

or debt (*Ib.*, pp. 24-27). But (3) if seemingly applicable, the *Campbell* case is erroneous in principle and should be overruled (*Ib.*, pp. 27-35).

Appellees claim: that the question is one of construction of the limitations statute relating to actions "upon a liability created by statute"; that the State Court (second appeal) held such statute to be one affecting remedy only; and that such declaration was a matter of local law not reviewable by this Court (Appellees' Brief, pp. 56-58).

For these contentions, they cite only two decisions of this Court, both of which hold merely that the State Court's construction of a state statute of limitations (that is, what the words of the statute mean) is binding upon this Court.[20]

Assuming, *arguendo*, this to be true, the question here presented is not one of "construction", *viz.*, meaning of words used, but solely of the legal effect of an unambiguous prior statute (limiting actions on a liability created by statute) upon a subsequent and equally unambiguous statute (the Blue Sky Law) creating a new statutory liability. Narrowing the question, it is one of the legal effect of the conceded expiration of the 6-year limitations period relating expressly to actions on a liability created by statute, upon the liability so created, i. e., whether such expiration vested in appellant a right of freedom from that liability within the term "property", as used in the due process clause, of which it could not constitutionally be deprived by the 1941 statute. Unless this Court is free to determine that question—and every phase of that ques-

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[20] In *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.* (1873), 20 Wall (87 U. S.) 137, 22 L. Ed. 331, it was said that the State Court's decision that a foreign corporation could not avail itself of the limitations statute was a "construction of the statute . . . binding upon us". In *Seneca Nation v. Christy* (1895), 162 U. S. 283, 40 L. Ed. 970, it was held that the "proper construction" of the limitations statute "and the time within which an action might be brought" was for the State Court.

tion—for itself, it would, practically speaking, be abdicating in favor of the State Court.

This Court has consistently refused so to abdicate in the many cases in which the contention was pressed upon it that the declaration of the State Court, that a statute raised only a question of remedy, was binding upon and not reviewable by this Court on constitutional grounds. *Terre Haute and Indianapolis Rd. Co.* v. *Indiana* (1904), 194 U. S. 579, 48 L. Ed. 1124; *Truax* v. *Corrigan* (1921), 257 U. S. 312, 66 L. Ed. 254; and *Home Insurance Co.* v. *Dick* (1929), 281 U. S. 397, 74 L. Ed. 926.[21]

A fortiori, this is true in a case such as at bar, where the State Court, in deciding this very question from the standpoint of the Federal Constitution, has expressly relied upon a decision of this Court (*Campbell* v. *Holt*) saying that "certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court" (R. 408).

In final analysis the question here presented is a federal one. In its determination this Court is not ousted from jurisdiction by the state court's characterization either of the right vested in appellant by the running of the statutory bar prior to the passage of the 1941 statute, or as to the legal effect of that statute upon that right.

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[21] Appellees' cases (Brief, p. 45) purportedly holding this right against remedy question to be one of local law are either not in point or actually sustain our contention. See, e.g., *First National Bank* v. *Anderson* (1925), 269 U. S. 341, 70 L. Ed. 295. Two of the cases cited by appellees (on other points) support the same rule. *Schuylkill Trust Co.* v. *Pennsylvania* (1935), 296 U. S. 113, at p. 119, 80 L. Ed. 91, and *West Side Belt Rd. Co.* v. *Pittsburgh Construction Co.* (1911), 219 U. S. 92 at 102, 55 L. Ed. 107.

Campbell v. *Holt is Not Applicable.*

Appellees again insist that there is a "single cause of action grounded upon blended violation of the Blue Sky Law and common law fraud" and that the statutory claim was not barred before the 1941 statute (Appellees' Brief, pp. 59-61). This we have already answered (*supra*, pp. 2-9).

Appellees' emphasis on the fact that *Campbell* v. *Holt* involved only a common law action on a contract supports our contention that it is inapplicable to the case at bar. As this Court said in that case, the contract nature of the action was "important" to that decision (115 U. S. at p. 622), and it was the basis of this Court's holding it inapplicable to the action based upon statute in *Danzer Co. v. Gulf Ry. Co.* (1925) 268 U. S. 633, 69 L. Ed. 1126. In the case at bar, the appellees have never claimed nor have the State Courts suggested that appellant's liability was upon contract. At all times, the purely statutory character of the asserted liability has been judicially recognized.

The importance of this distinction in the basis of liability, and the error of the State Court's refusal to hold that appellees' substantive right of action was conditioned and extinguished by the original limitations statute specifically covering actions upon "liability created by statute" (Main Brief, pp. 20-27) are shown by analysis of the true nature of the claim for breach of the registration statute.

From 1929 until 1935 appellant was subject to a serious liability imposed by the Blue Sky Law and the appellees' testatrix was in a most enviable position. She had the benefit of her stock purchase if the market price rose, and could recover her purchase price with 6% interest if the market fell. She had both the Bank stock she had purchased and also the credit of the Securities Corporation

(with a capital of over $66,000,000 at the time of sale, R. 238) to secure a judgment for return of purchase price if she elected to rescind. She could not lose. The seller (appellant) could at no time go to the purchaser, rescind and thus discharge the statutory liability. Only the passage of the limitations period could free it from that liability.

During the six-year period the sale was voidable only, at the option of the purchaser, *Edson* v. *O'Connell*[22] (1934), 190 Minn. 444, 252 N. W. 217; *Mertz* v. *H. D. Hudson Mfg. Co.* (1935), 194 Minn. 636, 261 N. W. 472.

In Stock Exchange parlance, the purchaser actually had a right to "put" the stock back to the seller at any time within the limitations period of six years from August, 1929, and receive her money back. After the expiration of that period, no such privilege (and no correlative liability of the seller) remained.

It follows that the State Supreme Court's application of the 1941 statute to this transaction in legal effect did more than merely remove the bar to, or revive appellees' old right of action. It created a new liability which, when related back to the old liability, which had expired six years before, covered an additional seven years (from August 1935 to July 1, 1942). The result of this holding was to transform the original six year option to rescind, into a thirteen year option.

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[22] The *Edson* case (after referring to the earlier cases of *Vercellini* v. *U. S. I. Realty Co.* (1924), 158 Minn. 72, 196 N. W. 672, *Webster* v. *U. S. I. Realty Co.* (1927), 170 Minn. 360, 212 N. W. 806, and *Drees* v. *Minnesota Petroleum Co.* (1933), 189 Minn. 608, 250 N. W. 563), said (252 N. W. at p. 218):

> "It follows that the purchaser of stock obtains a good title, and the sale is not as to him void, but voidable."

This Court in *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.* (1941), 312 U. S. 38, 85 L. Ed. 500, held that a contract for sale of securities not registered as required by the Federal Securities Act was not void.

The essence of the majority opinion in the *Campbell* case was that mere passage of time does not *discharge* a just debt. The implication is that the obligor was at all times under a duty to and *could* discharge that debt by payment. In the case at bar this analogy fails. As we have pointed out (*supra*) the seller here could not at any time elect to rescind and demand back the stock against repayment of purchase price. That option was vested in the purchaser alone. Until the latter elected to exercise it, the seller, although at all times since the sale under liability to comply with sellers demand if and when made, had no "debt" which it could discharge.

The unfairness of this unilateral liability was recognized and corrected in the very 1941 statute here involved, the seller now having for the first time the privilege of repurchasing the stock in advance of any demand by the purchaser.

The case at bar is governed, therefore, not by the principle of the *Campbell* case but by that of the *Davis* and *Danzer* cases.

This Court in unmistakable language in *Davis* v. *Mills*, (1904) 194 U. S. 451, 48 L. Ed. 1067, pointed out that, as a matter of sound public policy, courts have been and should be willing to consider limitations statutes as conditioning and limiting the right of action given by another statute, even though the limitations statute was enacted "at a different time" (p. 456) and was located "in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right" (p. 454). In the *Davis* case an 1895 statute, imposing liability upon corporate "trustees" for debts of the company upon their failure to publish its annual financial report, was held to be conditioned and limited by a separate and subsequently enacted limitations statute covering ac-

tions against either "directors" or "stockholders", for the purpose of enforcing either a "penalty or forfeiture" or "a liability created by law".

In the case at bar, the limitations statute (Sec. 9191 (2)), while broader as to classes of obligors, was more restrictive by its terms as to the classes of liabilities covered, i. e., only those "upon a liability created by statute", and expressly excluded actions for penalty or forfeiture.

Appellees urge, however, that because the limitation statute preceded by many years the liability statute, the earlier statute could not have been directed toward a liability statute that was not in existence at the time.

This argument will not survive analysis.

When the legislature enacted subdivision 2 of section 9191, providing that an action upon a liability created by statute, other than upon a penalty or a forfeiture, should be brought within six years, it created a special limitation as to a limited class of actions, applicable not only to those based upon liabilities created by existing statutes, but necessarily equally applicable to liabilities (other than penalties or forfeitures) created by subsequent statutes. When the Blue Sky Law was enacted in 1917 and revised in 1925, the legislature had before it the existing limitations statute, which provided an explicit limitation pattern into which this type of action fitted just as precisely as if the words of subdivision 2 of such statute had been repeated verbatim in the Blue Sky Law. Unless the legislature had then desired to alter the perfectly applicable, already existing, six year period of limitations, it had no occasion or reason to include any words of limitation in the Blue Sky Law. That the legislature had no such desire is conclusively demonstrated by the fact that it then provided no such alteration, and by the fact that in the 1941 general

revision of the Blue Sky Law, it provided for this same 6-year limitation period.

Upon the clearly stated principle of the *Davis* case, we therefore repeat that it is immaterial that the original limitations section here involved was enacted prior to the liability statute. Otherwise, "an unsubstantial distinction" (p. 456) would be given controlling effect in constitutional law.

Appellees' statutory right of action, conditioned as it was by the existing limitations statute, was extinguished by the running of the original statutory period. Appellant's freedom from liability thereby became a vested property right within the protection of the due process clause, which could not be abrogated by subsequent legislative action. *Danzer Co.* v. *Gulf Ry. Co.* (1925), 268 U. S. 633, 69 L. Ed. 1126.

Hence, *Campbell* v. *Holt*, in which solely a non-statutory right of action was involved, is not decisive of appellant's rights and the State Court erred in treating it as binding on the federal constitutional question presented.

The Error of Campbell v. *Holt.*

Appellees do not challenge appellant's showing (Main Brief, pp. 27-32): that in the 60 years following *Campbell* v. *Holt*, this Court has not once applied its holding to sustain the revival of a barred cause of action; that such holding is contrary to the established public policy against revival of "ancient claims" followed by this Court for over 125 years; that the majority of state courts, and virtually all legal writers on the subject have expressly followed the principle of the dissenting opinion; and that the federal courts have applied the case only to a tax claim revival statute, which, in *Graham* v. *Goodcell* (1931), 282

U. S. 409, 75 L. Ed. 415, was finally sustained on an entirely different (curative statute) ground.[23]

Appellees, thus, seem to admit the validity of the foregoing but claim that the 1941 statute should be sustained on the ground of a special equitable consideration, such as was involved in *Robinson* v. *Robins Dry Dock & Repair Co.* (1924), 238 N. Y. 271, 144 N. E. 579.

Neither the trial court nor the Minnesota State Supreme Court sustained constitutionality upon that ground. Much less does the record show any evidence to support such a claim.

We have already shown (Main Brief, pp. 32-33) that appellees have no special equity to warrant the application of the cautiously considered cases of *Robinson* v. *Robins Dry Dock & Repair Co., supra, Danforth* v. *Groton Water Co.* (1901), 178 Mass. 472, 59 N. E. 1033, and *Dunbar* v. *Boston & P. R. Corp.* (1902), 181 Mass. 383, 63 N. E. 916. Whatever the merit of those decisions upon their respective facts, each virtually conceded that the majority and better general rule was against revival of a barred claim. Each reluctantly permitted "revival" only by resort to dubious reasoning described by Justice Holmes in *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338, 66 L. Ed. 647, as "various circumlocutions" in order to overcome "some slight technical defect" or to attain "some strongly prevailing view of justice."[24]

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[23] This Court considered matters of this character in its review of *Swift* v. *Tyson*, in the light of public policy, and the overruling of that case in *Erie Railroad Co.* v. *Tompkins* (1938) 304 U. S. 64, 82 L. Ed. 1188.

[24] Contrary to appellees' intimation, at p. 69 of their brief this Court's reference to these cases in *Paramino Lumber Co.* v. *Marshall* (1940), 309 U. S. 370, 84 L. Ed. 814 (at footnote 17) does not suggest approval of their rule as applied to judicial, as distinct from administrative, proceedings and when the cause of action has already become barred.

The purchaser had adequate means of ascertaining the violation and could have sued immediately after the sale and for six years thereafter. Non-registration was constructively notorious. The files and records of the Commissioner of Securities, and Blue Sky regulations and requirements, were public and open. The fact of non-registration of this security could have been ascertained by the purchaser by a telephone call or letter [25] at any time before or after the sale on August 10, 1929. The Blue Sky Law required registration data to be recorded in the Commissioner's office. (Mason's 1927 Minn. Stat., §3996-5; Minn. Stat. 1941, Sec. 80.08). Non-registration could not have been effectively concealed from her.[26] If she was unaware of the seller's wrong for more than the six years, it was the result of her own indifference, as to which she can claim no equity here.[27]

Nor do any of appellees' arguments as to "kinds" of tort claims (p. 64), or as to the claimed injustice in the State Supreme Court's 1941 decision against appellees on the tolling statute (p. 69), or as to the so-called "benefits"

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[25] The record in the State Court (second appeal) filed with this Court shows that the Commissioner's office advised appellees counsel as early as July of 1935 (two years before this action was commenced) that the Chase National Bank Stock (part of the combined unit) was not registered. (R. 1014, Defendant Ex. 1.) The exhibit, among others, was omitted from the printed record on the appeal to this Court. There is no doubt that such information was at all times available.

[26] The findings of the trial court, as to the cause of action for fraud, were expressly not determined by the State Supreme Court and are not involved in any issue now before this Court.

[27] The record shows that plaintiff was a person of at least average education and background, that she was well advised by her husband and family who were active in investment business (R. 83-103; 108-133) and that at the time of the purchase she knew of the state Securities Commission, its function to "look into stocks" and to register only "reliable stocks" (R. 90, f. 179), and that the state had certain "legal requirements" on stocks sold (R. 87, f. 174).

of the 1941 law (p. 72), establish any equity in favor of appellees.

Even if her statutory claim be one in "tort", it is based on purely statutory liability and the state court's adjudication that the six-year limitations period ran from the date of sale (not from date of alleged discovery of the breach of statute) is conclusive here. Furthermore, the few cases which have permitted revival of barred claims on the "equitable consideration" theory have done so, not upon any special equity arising from the nature of the claim itself but only because of seeming injustice or inequity arising entirely from the absence of a reasonable period of time within which to commence the action. (See, *e.g., Robinson* v. *Robins Dry Dock and Repair Co., supra,* p. 23.) Here, no claim is made or could be made that the original plaintiff did not have the full six-year period which was well established and well known as a matter of law and which obviously was a reasonable period.

Likewise, the state court's final determination that she did not have the benefit of the tolling statute created no equity. There is no proof in the Record that she ever knew of appellant's removal from the state, or that she was induced thereby to believe the statute had been tolled and hence was lulled into non-action. She therefore cannot now claim that she is entitled to a special rule of law because the six-year period, available to her, was not extended indefinitely.

If any general "benefits" policy can be read from the entire 1941 statutory provision, it is that the legislature intended to place a well-defined six-year limit on actions to recover for sales of securities made in violation of the Blue Sky Law. Certainly there is no indication of an intention to revive, for one year, odd and sundry causes of action

as to holders who might claim some special equity. Nor did the State Supreme Court find any such intention of the legislature, even in the course of its unwarranted excursion into factual matters unproved. It allowed revival in favor of all purchasers of such stock from appellant, without regard to whether or not the purchaser had actual and immediate knowledge of the violation of the statute.

Finally, the cases which appellees' claim are analogous (Appellees' Brief, pp. 74-75, footnote) are so strictly limited in character as to support on principle our contention that in this and like cases the rule of *Campbell* v. *Holt* is contrary to sound public policy and should be overruled. Thus, *McNair* v. *Knott* (1937), 302 U. S. 369, 82 L. Ed. 307, which cites at least four of the other decisions, holds that the statutes described as "remedial," "curative" or "enabling" laws, which merely validate contracts or transactions according to the intentions of the parties, are proper. *United States* v. *Heinszen* (1907), 206 U. S. 370, 51 L. Ed. 1098 and *Rafferty* v. *Smith, Bell & Co.* (1921), 257 U. S. 226, 66 L. Ed. 208, held merely that Congress could ratify what it could have done in the first place, in the levy of taxes. *Luria* v. *United States* (1913), 231 U. S. 9, 58 L. Ed. 101, held that a rule of evidence could be changed retrospectively. It is to be noted, also, that not one of these cases relies upon the broad holding of *Campbell* v. *Holt*.

Appellant had a vested property right in the freedom from liability, once the statutory period had run, which was entitled to constitutional protection against legislative interference, *Terre Haute and Indianapolis Rd. Co.* (1904), 194 U. S. 579, 48 L. Ed. 1124. It was entitled to the same protection under the due process clause, as this Court has given to accrued rights of action which legislatures have

attempted to extinguish, *Ettor* v. *Tacoma* (1912), 228 U. S. 148, 57 L. Ed. 773, and *Coombes* v. *Getz* (1931), 285 U. S. 434, 76 L. Ed. 866.

APPELLANT'S POINT III.

Equal protection denied.

(Appellant's Brief, pp. 35-40, Appellees' Brief, pp. 77-81).

In answer to appellant's contention that the 1941 statute deprived appellant of equal protection of the laws, appellees urge little which has not already been anticipated and answered in appellant's Main Brief (pp. 35-40). The gist of appellees' claim is that the proviso is one which, by its wording, applies to all sellers and types of securities; that the court did not interpret it to apply only to appellant and National City Company, but, rather, that its comments about the law's application to those companies were merely a listing of reasons or motives which prompted the legislature to enact such a law.

The statute on its face is general in scope and nowhere singles out the appellant and National City companies by express mention. However, when the court came to apply the statute, it was confronted with a general limitation of six years followed by the proviso. In order to avoid the usual interpretation of a proviso as a limitation on the exercise of the general scope of the statute, the Court found it necessary to say: that there would be few if any cases to which the law would apply if the proviso were construed as a limit on the six year period; that the legislature knew about many cases pending against appellant and the National City Company and the decision of the Court on the prior appeal holding such Blue Sky actions barred; and

that the legislature must have intended to lift the bar of six years in respect to those very cases and these particular companies. This is a case where language of general import has been re-made in such fashion by Court interpretation as to relate particularly to appellant and one other company upon the assumption that these were the only companies to which the law could apply, and as we pointed out in our Main Brief, a classification including these companies particularly for extension of the statute of limitations is not a reasonable one (Appellant's Brief, pp. 38-40).[28]

We say "assumption", because, as we show in our next point, the legislature had no such intent in mind, a fact which appellant has not been permitted to show.

APPELLANT'S POINT IV.

Fair trial denied.

(Appellant's Brief, pp. 40-49, Appellees' Brief, pp. 85-88).

The State Supreme Court's assertions as to the "plain" or "clear" language of the statute (R. 405, 406) are nullified by its lengthy findings of legislative intent and its ultimate conclusion that the statutory language "and the circumstances under which the law was enacted" (R. 406) warranted the application of the law to this case. To reach this result, the so-called "clear" language had to be remade by judicial disregard of the word "provided"—the key word of the proviso clause. Why, if the legislative

[28] This is similar to the situation where a law, general in terms, is capable of application to a special situation only, and, therefore, violative of State Constitutional safeguard against special legislation. *Lodoen* v. *City of Warren* (1920) 146 Minn. 181, 178 N. W. 741; *Nichols* v. *Walter* (1887) 37 Minn. 264, 33 N. W. 800.

language was so clear and plain, did the Court rely so heavily upon extraneous circumstances? Appellees have not given any answer to this determinative aspect of legislative intent.

Their brief distinction of *Ohio Bell Telephone Co.* v. *Public Utilities Commission* (1937), 301 U. S. 292, 81 L. Ed. 1093, is itself a concession. Of it, they say, "There the evidence offered went to a vital factual issue in the case" (p. 84). That is exactly the nature of the evidence appellant sought to offer on the vital (if not controlling) issue of legislative intent (Main Brief, p. 46). As is said in their own cited case (*United States* v. *Missouri Pacific Ry. Co.* (1929), 278 U. S. 269, 73 L. Ed. 322), significant circumstances leading up to a law may be "noticed". Such judicial notice, however, must be employed in accordance with the principles of the *Ohio Bell* case.

The primary question here is not as to the admissibility of one kind of evidence or another, but solely whether appellant is to have the opportunity, guaranteed by the Fourteenth Amendment, of a fair trial on the factual question of legislative intent and the opportunity (not yet afforded) to offer evidence thereon. Consequently, appellees' argument and cases, as to claimed incompetency of the offered proof (pp. 86-88) are irrelevant to the due process question presented.[29]

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[29] If relevant here, we have shown that the offered evidence was competent. (Main Brief, p. 46.) Excepting *Soon Hing* v. *Crowley* (1885), 113 U. S. 703, 28 L. Ed. 1145 (which considered only intent of the city council as to an ordinance), and *Helvering* v. *City Bank Farmers Trust Co.* (1935), 296 U. S. 85, 80 L. Ed. 62 (which held that the statutory language was too clear for consideration of proof of intent), the several cases of this Court cited by appellees (pp. 87-88) did receive and consider evidence of legislative reports, debates and statements of sponsors.

V.

All constitutional questions were seasonably raised and this Court has jurisdiction on appeal.

1.

Denial of Due Process by Statutory Abrogation of Final Judgment.

(Appellant's Point I, Main Brief, p. 13, Appellees' Brief, pp. 27-32.)

The Point was Seasonably Raised.

Appellees do not challenge the correctness of our summary of the procedural steps on this point, as we fully presented them in our Jurisdictional Statement (pp. 6-10 thereof) and which we again summarized in our Main Brief (pp. 6-11). They are briefly, as follows:

Appellant, promptly on its alternate motions to the trial court for amended findings or a new trial, asserted error

> (a) in the making of Finding of Fact XXXII, declaring the statutory claim to have been revived by the 1941 statute (R. 318, at 323, par. No. 22; R. 338, par. 13);
>
> (b) in the making of the related conclusions of law (R. 347, par. 23 and 24);
>
> (c) in the failure to substitute a conclusion of law that the action was barred and not revived by the 1941 law (R. 326, par. 29);

which motions were made upon the ground that the statutory claim was barred by the prior mandate of the State Supreme Court (R. 328, par. 4 and 6; R. 348, par. 3) and that if the 1941 law was so construed to effect revival, it would deny appellant its property without due process

of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States (R. 338, par. 13(c)).

After the adverse trial court decision, appellant assigned to the State Supreme Court error in the denial of its alternative motions just reviewed, generally, (R. 364, par. 4) and *specifically* as to said Finding XXXII, the error of the trial court in making such finding, the error in denying appellant's motion to strike the same and substitute another finding, and the error in denying appellant's motion for a new trial (R. 384-386), citing the State Supreme Court to the particular motions, above stated in the trial court.

We know of no case or rule in Minnesota practice which requires, as appellees' comment implies (Appellees' Brief, pp. 27-28), that an appellant must include "argument" or "grounds" as to each of the errors assigned. Rather, the State Supreme Court has expressly held that such matters should not be included in the assignment of errors.[30]

Within established procedure, appellant seasonably and properly raised the point relating specifically to prior and final judgment. This appellees expressly admitted in their "Response to Petition for Rehearing" when they said, "the claim of vested adjudication was raised by petitioner on the appeal" (R. 470, f. 1929). It was argued in the briefs, within the contemplation of their own cited case, *Peterson* v. *Pete-Erickson Co.* (1932), 186 Minn. 583, 244 N. W. 68 (Appellees' Brief, p. 29).

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[30] Minnesota Supreme Court Rule VIII, par. 3(d) merely states, "Assignments of error shall be separately and concisely stated and numbered, without repetition." (212 Minnesota Reports, xlii.) The Minnesota court in *Lestico* v. *Kuehner* (1938), 204 Minn. 125, 283 N. W. 122, at 127, denied statutory costs to an appellant who included "as part of each assignment, a summary of the argument, later elaborated, in its support."

If there could be any valid doubt, the State Supreme Court's opinion shows, what the record of the case establishes, that the constitutional law claims on Point I (as well as Point II) were raised before and decided by the highest State Court. The opinion is itself conclusive on the matter.[31]

The cases appellees rely upon here are not pertinent (Brief, pp. 29-30).[32] Appellant here did preserve the constitutional questions adequately and within the view of this Court in *Schuylkill Trust Co.* v. *Pennsylvania* (1935), 296 U. S. 113; 80 L. Ed. 91 (cited by appellees at p. 30) where the trial court motions and appellate court assignment of errors were in substantially the same form as in the case at bar and contained no argument of constitutional grounds.

A Federal Question Is Presented.

Our argument upon the merits of this point establishes that the prior adjudication was final upon the single issue

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[31] This Court has long held that it will review "contentions with specific reference to the Constitution of the United States" which were discussed and decided in the State Court's opinion, even where the appellant failed to mention them in his assignment of errors. *Nickey* v. *Mississippi* (1933), 292 U. S. 393, 78 L. Ed. 1323, and cases there cited; also, numerous cases of this Court cited in *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, Sec. 77, p. 130-133.

Furthermore, this Court has repeatedly held that it will examine the record to determine the presence of a federal question even though it was not decided by the State Supreme Court in express terms, but only "in substance and effect". *Ward* v. *Love County* (1919) 253 U. S. 17, 64 L. Ed. 751; *Schuylkill Trust Co.* v. *Pennsylvania, supra*. Mere silence of the State Court on the federal question, actually present, will not affect this Court's jurisdiction of the case. *McCullough* v. *Commonwealth of Virginia* (1898), 172 U. S. 102, 116-117, 43 L. Ed. 382.

[32] See, for example *Godchaux Co.* v. *Estopinal* (1919), 251 U. S. 179, 64 L. Ed. 213, *American Surety Co.* v. *Baldwin* (1932), 287 U. S. 156, 77 L. Ed. 231, and *Herndon* v. *Georgia* (1935), 295 U. S. 441, 79 L. Ed. 1530, where federal questions were not presented to or decided by the highest state courts, but were urged for the first time on petitions for rargument which were summarily denied.

of statutory violation, and vested a right of property in appellant, which is subject to the protection of the due process clause as against subsequent legislative interference. Of necessity this is a federal question.

2.

Denial of Due Process by Statutory Revival of Barred Statutory Claim.

(Appellant's Point II, p. 20; Appellees' Brief, pp. 53-58).

The Point was Seasonably Presented.

In answer to appellees' like contention on Point I, we reviewed the record and the opinion of the State Supreme Court and showed that both Points I and II were not only raised seasonably and in proper form, but that the State Court actually decided the question against appellant (*supra*, pp. 30-32). In the face of this record, appellees' suggestion (Brief, pp. 54-55) that the opinion does not say in so many words that appellant raised the point or show that the court's "holding on the point was responsive to any contention made by appellant," cannot be taken seriously.[33] Appellees expressly concede and state that appellants did raise the issue of due process (Appellees' Brief, p. 19).

A Federal Question is Presented.

Appellees claim that the State Supreme Court characterized the original bar of the statute of limitations to

[33] Appellees' case, *Lovell* v. *Griffin* (1937), 303 U. S. 444, 82 L. Ed. 949, fully sustains our claim that the question was properly raised and decided. *Clarke* v. *McDade* (1896), 165 U. S. 168, 41 L. Ed. 673, and *Osborne* v. *Clark* (1906), 204 U. S. 565, 51 L. Ed. 619, are clearly not applicable since the federal question in each case was not raised or decided even in the highest State Court.

this claim for breach of statute as one affecting remedy only, and that such declaration constituted a determination of local law, which cannot now be reviewed by this Court (Appellees' Brief, pp. 56-58). This has been fully answered. (*Supra*, pp. 16-17).

3.

Denial of Equal Protection of Law

(Appellant's Point III, p. 35; Appellees' Brief, pp. 75-77).

Contrary to appellees' claim, we submit that the point was seasonably raised on the Petition for Rehearing in the State Supreme Court which was appellant's first opportunity of so doing (Point V of Petition for Rehearing, (R. 446-52)).

It is well settled in this Court that if the ruling of the State Court could not have been anticipated and a constitutional right has been denied for the first time by a ruling made on appeal, a litigant, thus surprised, may challenge such ruling in his Petition for Rehearing and the challenge is timely. *Saunders* v. *Shaw* (1916), 244 U. S. 317, 61 L. Ed. 1163; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner* (1930), 281 U. S. 313, 74 L. Ed. 870; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107; and *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, 77 L. Ed. 360.

The Supreme Court's interpretation of the 1941 statute as one directed against appellant and National City Company was unanticipated by both parties. Appellees did not, either in the trial or Supreme Court, contend therefor. The trial court's indefinite finding as to the applicability of the statute (Finding XXXII, third paragraph, R. 313-314), which it refused to clarify upon appellant's specific motion

(R. 338) did not forewarn appellant of the Supreme Court's interpretation. No evidence was offered on that score (which is the basis of our Point IV), nor do appellees now point to any ruling or indication of either the trial or Supreme Court which suggested its possibility. Their cases (p. 83), therefore, are not relevant.

4.

Denial of Fair Trial

(Appellant's Point IV, p. 40, Appellees' Brief, pp. 82-85).

The Point was Seasonably Presented.

Upon the same decisions of this Court, cited for the comparable question under Point III (*supra*, p. 34), we submit that the State Supreme Court's resort to facts and circumstances, extraneous to the record, to ascertain the intent of the legislature could not have been anticipated prior to the opinion, and that appellant raised the constitutional objection at its first opportunity (Petition for Rehearing, Point II 2, R. 417-420). Furthermore, appellees answered the point, so raised, in their Response to Petition for Rehearing (R. 463, at 470-473): *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, at 366, 77 L. Ed. 360, at 367 suggests that this fact inclines the Court to say the point was seasonably raised.

Granted that appellant should have anticipated a general construction of the 1941 statute against it, as indicated by its objections on the basis of the due process clause, (Points I and II), there is nothing in the record to suggest that appellant reasonably could have expected that the State Supreme Court would rely upon factual matters not

of record, in order to find a legislative intent, admittedly in conflict with the word "provided". Nor do appellees contend that there is any record proof to support such an intent.

A Federal Question is Presented.

Appellees say that the question is not a federal one because it arises out of a matter of local trial practice and relates to the admissibility of evidence. See, in this connection, our argument, *supra,* at pp. 16-17.

Even though the ultimate question is one of State law, such question must be decided in accordance with due process. Both parties must have a fair opportunity to be heard. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill* (1930), 281 U. S. 673, 74 L. Ed. 1107, the interpretation of a State tax law was admittedly one solely for the state court. Judgment was reversed, however, because a fair trial had not been granted appellant. This Court said (pp. 681-2):

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

See, also, *Baltimore & Ohio Ry. Co.* v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

Conclusions.

For all the reasons given in our Main Brief and in this Reply, we respectfully submit that appellees' motion to dismiss or affirm should be denied and that the judgment appealed from should be reversed upon any one or all of the four grounds urged.

Dated: February 26, 1945.

Respectfully submitted,

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